# SOCIAL COMPACT AND CONSTITUTIONAL CONSTRUCTION

STUDENTS of American history or of political philosophy need not be told that in the Revolutionary period men believed that society originated in compact. Our forefathers believed too that the state was formed on agreement and that the King was bound to his subjects by an original contract. To secure the rights of life, liberty and the pursuit of happiness governments were supposed to have been "instituted among men, deriving their just powers from the consent of the governed." These doctrines were living, actual ideas to the men of one hundred and twenty-five years ago. They found continual expression in the speeches, letters and public documents of the time.[1] In his speech in the Parson's Cause Henry maintained that government was "a conditional [constitutional] compact composed of mutual and dependent covenants, the King stipulating protection on the one hand, and the people stipulating obedience and support on the other." In the famous argument on the writs of assistance, when, we are told, the child of independence was born, James Otis "sported upon the subject [of natural rights] with so much wit and humor, that he was no less entertaining than instructive." He asserted "that every man, merely natural, was an independent sovereign, subject to no law, but the law written on his heart, and revealed to him by his maker, in the constitution of his nature, the inspiration of his understanding and his conscience."

Locke was the philosopher of the American Revolution, as he was of the Revolution of 1688.[2] The deposition of James and the principles laid down in defense of the revolt against kingly author-

[1] The following is a typical example of the announcements of the theories of the time. "Some citizens used the following language: 'If the king violates his faith to, or compact with, any one part of his empire, he discharges the subjects of that part, of their allegiance to him, dismembers them from his kingdom, and reduces them to a state of nature; so that in such case he ceases to be their king . . . And the people are at liberty to form themselves into an independent state.'" Bradford's *History of Massachusetts*, pp. 333–334. Boston, 1822.

[2] There is abundant evidence of the fact that Locke's Essays on Government were read and studied in the Revolutionary period. His *Human Understanding* was used as a text in some of the colleges, and though this book does not cover the subject of government, the psychology of the work was what I may call the compact psychology.

ity undoubtedly made a very deep impression on the colonial mind, and when irritation waxed strong in America against George III. recourse was naturally had to the fundamental doctrines with which history had made Englishmen familiar. The revolt was justified on the ground that the King had encroached on the natural and reserved rights of the colonists, and the final declaration that they were "absolved from all allegiance to the British crown," was based on the belief that the King had broken his contract. Not only the argument, but in some measure the language of Locke is used in the Declaration of Independence.[1]

These assertions are not novel and will, I think, be readily accepted by any student who is acquainted with the material of the Revolutionary period. It has seemed to me, however, that sufficient attention is not commonly paid to the influence and bearing of these basic principles of political philosophy in the period succeeding the Revolution. The foundation doctrines everywhere current during the Revolutionary time were not likely to disappear at once, for on them rested the right of rebellion, through them came independence, upon them was founded national existence. We might be willing to assert, without investigation, that the ideas which men cherished and the philosophy upon which they acted would be sure to affect the thoughts and activities of public men during the early constitutional period and for many years after the establishment of the United States. It is certainly important for us to understand the ideas which men held concerning the nature and origin of the state and society, and to know the foundations upon which they believed government to rest. In the study of any period such knowledge and appreciation are needed, but they are absolute requisites for the understanding of men's words, motives and acts at a time when governments were in process of construction and new states were forming. If we are to start historically upon the task of constitutional construction, we must necessarily begin by seeking to discover how men used terms, and we must likewise endeavor to appreciate their essential attitude of mind toward government and the essential nature of their thinking on matters of political concern.

It may be advisable to state with some explicitness what may be considered the fundamental notions which were commonly accepted when our national and state constitutions were established. Most of these are doubtless familiar to the reader. I shall not at-

[1] "But if a long train of abuses, prevarications and artifices, all tending the same way, make the design visible to the people," etc.—Locke, Sec. 225.

"But when a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism."—*Declaration of Independence.*

tempt to give a consistent philosophy or to set forth the ideas in more than general terms.[1] The underlying idea was that men originally existed in a state of nature free from restraint. Each man was an individual sovereign and possessed of all rights, though dependent entirely upon his own strength to defend his rights. Society was formed by agreement among men, each individual surrendering a portion of his natural rights and retaining others which were inviolably his. Government and political organization also rested upon agreement. Thus through the conscious action and consent of individuals, permanent institutions were established. Now beneath these ideas of political philosophy was what I may call the metaphysical notion, that unity can be formed by the conscious action of so many isolated beings—unity can be formed by the separate movement of isolated atoms. Akin to this compact idea and necessarily bound up with it was the idea that man could bind himself; obligation grew out of consent, and did not necessarily depend on force, certainly not on a pre-existing force. Law was not necessarily the expression of the will of a pre-existing superior directed toward an inferior, but rested like everything else on the consent or the acquiescence of the individual. Not that any individual could at any time cast off his obligations and recall his acquiescence; on the contrary, real obligations permanent and binding came from original agreement.[2]

It will be seen at once that there is something very familiar in many of these doctrines, even at the present. Some of them have become embodied in legal phrases and in political catch-words. To discover just how far these ideas have been perpetuated in writings on municipal law would be an interesting task; but my present purpose is to consider only constitutional law or rather constitutional history and to note the bearing of such theories on the general question of the nature of the United States and the Constitution. In order that the influence and meaning of these doctrines may be more fully seen, it may be well to phrase the fundamental ideas of modern political philosophy. The supposition that society originated in compact is now discarded and with it the notion that man ever existed in a state of nature possessed of all rights. So-

[1] It is difficult, for example, to describe a state of nature with exactness, because of different theories and ideas. On the whole, perhaps it is fair to say that men accepted Hobbes's conception of the perfect lawlessness of the state of nature and coupled it with Locke's notion of compact and the resulting government.

[2] See especially the exceedingly able chapter on Municipal Law in James Wilson's Lectures on Law, in which in the course of fifty pages he attacks Blackstone's definition of law—as a "rule of civil conduct prescribed by the supreme power of the state." "The consequence is," says Wilson, after a long discussion, "that if a man cannot bind himself, no human authority can bind him." *Works*, I. 193, Andrews's edition.

ciety is looked upon as organic, a natural thing, and not the result of intellectual agreement; society is not superimposed on man, but, as Aristotle said, man is by nature [originally] a political being. Government may indeed be said to rest upon the consent of the governed considered as a whole, since government in America is distinctly the creature and agent of the body politic; but man owes obedience to the government and to the will of the body politic, because he is born into society and the state, and is an essential portion of it. The state is an organism, a personality, gifted with a purpose and a will. Bluntschli has carried this so far that he has discovered that while the church is feminine the state is masculine; he is ready to tell us the gender, possibly the sex of the organism. Law is the expression of the will of the body politic, the superior and all-controlling being; law emanates from a being and is binding because of the force of the controlling entity behind it. Sovereignty is the ultimate will and controlling purpose of the body politic.

To the compact philosophy, then, may be said to belong three ideas which were of influence in our constitutional history: (1) The state is artificial and founded on agreement; (2) Law is not the expression of the will of a superior, but obtains its force from consent; a man can indissolubly bind himself; (3) Sovereignty is divisible. I know full well that many of those who wrote of the compact theory believed in the indivisibility of sovereignty. Hobbes held that the monarch was possessed of all power. And Rousseau, —who however influenced the American idea very little,—believed in a sort of indivisible sovereignty.[1] Even Vattel, who was used much more than Rousseau by the statesmen of the latter part of the last century, seems on the surface of things to teach that sovereignty is indivisible; but as a matter of fact his reasonings and arguments on the general subject under consideration do not bear out the idea of the indivisibility of sovereignty; a consistent part of the compact idea of law was that a body of men could surrender a portion of its right of self-control and could be bound by its voluntary agreement, thus limiting and confining its power of self-determination. But if the reader does not agree with this statement, this at least he will accept, that there is nothing in the character or the fundamentals of the compact philosophy which makes a division of sovereignty unthinkable; and if he examines the writings

[1] As the state and society were conceived by our forefathers, *complete political, absolute and unlimited power inhered neither in the state nor in the government.* "Locke and our own forefathers . . . start with certain natural legal rights possessed by the citizens as individuals, limit the authority of the sovereign power accordingly, and maintain that any attempt on its part to violate these rights is unlawful." Lowell, *Essays on Government*, p. 172.

of our early constitutional period he will find the prevalence of the idea that sovereignty could be divided.[1] The tenets of the organic philosophy are directly opposed to the three ideas I have just mentioned: (1) The state is natural and original, and a natural thing cannot be the result of intellectual agreement; the only result of agreement is an agreement, not a new unity; (2) Law is the expression of the will of a pre-existing superior; (3) Sovereignty, which is the will and purpose of a being, is necessarily indivisible. Divisibility is simply unthinkable.

When the Constitution of the United States was being made, men did not speak or think in the terms of the organic philosophy. Some of them, it is true, were more or less distinctly conscious of the essential oneness of the American people; some of them believed that the states never had been sovereign; some of them, seeing the fact of nationality, demanded that political organization should be in keeping with this fact. But the organic philosophy was developed in the next century,[2] and like all philosophy it came not from the thinking of the closeted philosopher, but from the actual development of society. While philosophic doctrine may react upon human affairs, human affairs in the progress of history beget philosophic doctrine. If I am right in the assertion that men thought and spoke in terms of the compact philosophy, it follows that we must necessarily interpret their conscious acts in the light of that philosophy. I do not say that it is entirely unjustifiable to interpret the period from 1760 to 1790 in accordance with the precepts and the principles of the organic idea;[3] but I mean simply to assert that if we seek to

[1] I do not mean to say that no one asserted the indivisibility of sovereignty. Perhaps it was clearly stated in the speech of Morris in the Philadelphia Convention, *Madison Papers*, May 30. "He contended, that in all communities there must be one supreme power, and one only." Wilson in the Pennsylvania Convention hinted once at the same idea and there are a few other instances.

"Though in a constituted commonwealth standing upon its own basis and acting according to its own nature—that is, acting for the preservation of the community, there can be but one supreme power, which is the legislative . . . yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them." Locke, *Two Treatises on Government*, Book II., § 149.

[2] Perhaps I should again, from motives of caution, remind the reader that in the text I am speaking in general terms. Burke for example, because of the historical character of his thinking, saw that the state and society were products of history and were not the creatures of mere momentary planning and consent by puny individuals. But the general truth is as stated above. The full organic idea could not come before the organic fact of this century, nor could the philosophy come before Hegel and Kant.

[3] Such a treatment as that of Burgess, *Political Science and Comparative Constitutional Law*, I. 98–108, for example, and large portions of that of Von Holst, seem to me entirely justifiable. But of course it must be borne in mind that the authors are seeking fundamental principles underlying conscious action. I have discussed this matter at greater length at the end of this article.

follow out *historically* the interpretation of the Constitution or to find out what men thought of it at the beginning, we must get into their attitude of mind and understand their method of thinking.

An examination of the writings of the period seems to demonstrate that men approached the subject in hand—the establishment of a new constitution and government—guided by the ideas of the compact philosophy and, moreover, that they often directly and explicitly likened the Constitution of the United States to a new original constitutional or social compact. No one who has studied the primary material will be ready to assert that men consistently and invariably acted upon a single principle, that they were altogether conscious of the nature and import of what was being done and that they constantly spoke with logical accuracy of the process. Such consistency and philosophic knowledge do not appear in the affairs of statesmen. But as far as one can find a consistent principle, it is this, that by compact of the most solemn and original kind a new political organization and a new indissoluble unit was being reared in America. The compact was sometimes spoken of as a compact between the individuals of America in their most original and primary character; sometimes it was looked on as a compact between groups of individuals, each group surrendering a portion of its self-control and forming a new order or unity just as society itself was constituted. Sometimes the idea was not so distinct an application of the social compact theory, but was coupled with the notion that individuals and groups of individuals could enter into binding and indissoluble relationships by agreement, acquiescence and consent. A few of the more patent illustrations will help in sustaining the position here taken.

Pelatiah Webster, to whom Madison gives the credit of being one of the very earliest to propose a general convention,[1] issued a pamphlet[2] in 1783 in which the general idea is clearly put forth.

"A number of sovereign States uniting into one Commonwealth, and appointing a supreme power to manage the affairs of the union, do necessarily and unavoidably part with and transfer over to such supreme power, so much of their own sovereignty, as is necessary to render the ends of the union effectual, otherwise their confederation will be an union without bands of union, like a cask without hoops, that may and probably will fall to pieces as soon as it is put to any exercise which requires strength.

"In like manner, every member of civil society parts with many of his natural rights, that he may enjoy the rest in greater security under the protection of society."

[1] *Madison Papers*, Introduction.

[2] A *Dissertation on the Political Union and Constitution of the United States.* I take my quotation from *American History Leaflets*, No. 28, p. 7. The italics of the original are omitted.

The debates in the Philadelphia Convention contain references to the exact thought so plainly presented by Webster, and give other evidence of the character of the philosophy within which men were thinking. James Wilson saw as clearly as any one the necessity of bringing the new government directly into contact with citizens, and he saw, too, that there must be expression for the national life; but he could not say that the American people, already a unit, fused by facts into one body politic, were using this convention as a means of registering their sovereign will in a constitution which would be law and binding on all parts of the body politic.[1] On the other hand he spoke in terms of the compact philosophy.

"Abuses of the power over the individual persons may happen, as well as over the individual States. Federal liberty is to the States what civil liberty is to private individuals; and States are not more unwilling to purchase it, by the necessary concession of their political sovereignty, than the savage is to purchase civil liberty by the surrender of the personal sovereignty which he enjoys in a state of nature."[2] "We have been told that each State being sovereign all are equal. So each man is naturally a sovereign over himself, and all men are therefore naturally equal. Can he retain this equality when he becomes a member of civil government? He cannot. As little can a sovereign State, when it becomes a member of a federal government."[3]

Perhaps the clearest evidence that men were thinking in terms of the compact philosophy is contained in the discussion over the question as to whether the Articles of Confederation were still binding. In regard to this matter there were naturally different views. All had had experience with treaties between sovereign powers; and Madison contended that under such a contract as the Articles of Confederation a breach by one of the parties absolved all. Other speakers, considering the articles as something more than a mere treaty or a naked agreement between independent states, and being governed in their thinking in some measure by the compact philosophy, denied that a breach threw the members at

[1] See "James Wilson in the Philadelphia Convention," by A. C. McLaughlin, *Political Science Quarterly*, XII. 18, 19.

[2] *Madison Papers*, II. 824, June 8. Hamilton said that "men are naturally equal, and societies or states when fully independent are also equal. It is as reasonable, and may be as expedient, that states should form Leagues or compacts, and lessen or part with their natural Equality, as that men should form a social compact and in doing so surrender the natural Equality of men." King's Minutes, King's *Life and Correspondence*, I. 610.

[3] *Madison Papers*, II. 835. Madison declared that the fallacy of the reasoning drawn from the equality of sovereign states, in the formation of compacts, lay in confounding "mere treaties . . . with a compact *by which an authority was created paramount to the parties and making laws for the government of them.*" *Ibid.*, 978. The italics are my own. Here we have the compact philosophy in its pure state: agreement founding an authority superior to the creator of that authority. See remarks of Sherman, *ibid.*, 983. Notice also *ibid.*, 1183.

once into a state of nature toward one another. "If we consider the Federal Union," said Madison, "as analogous, not to the social compacts among individual men, but to the Conventions among individual States, What is the doctrine resulting from these Conventions? Clearly, according to the expositors of the law of nations, that a breach of any one article by one party, leaves all other parties at liberty to consider the whole convention as dissolved, unless they choose rather to compel the delinquent party to repair the breach."[1] On the other hand Wilson "could not admit the doctrine that when the colonies became independent of Great Britain, they became independent also of each other."[2] Hamilton agreed with Wilson, and, denying that the states "were thrown into a state of nature," denied also of course that the Confederacy could be dissolved by a single infraction of the articles;[3] in other words, the Articles of Confederation were articles of union drawn up by communities which were already bound together in a social relationship. Luther Martin vehemently contended that under the Articles the states "like individuals were in a state of nature equally sovereign and free," and that although they might give up their sovereignty they had not done so and ought not to do so. "In order to prove that individuals in a state of nature are equally free and independent, he read passages from Locke, Vattel, Lord Somers, Priestley. To prove that the case is the same with States till they surrender their equal sovereignty, he read other passages in Locke and Vattel and also in Rutherford. That the states, being equal, cannot treat or confederate so as to give up an equality of votes, without giving up their liberty."[4] Martin also declared that "to resort to the citizens at large for their sanction to a new government, will be throwing them back into a state of nature; that the dissolution of the State Governments is involved in the nature of the process; that the people have no right to do this, without the consent of those to whom they have delegated their power for State purposes."[5]

In this speech, which was one of the longest and ablest of the Convention,[6] Martin adhered with remarkable accuracy to the compact theory of the organization of the State and government. So

[1] *Madison Papers*, II. 895.

[2] *Ibid.*, 907.

[3] *Ibid.*, 907.

[4] *Ibid.*, 975. It ought to be apparent that to men who thought in this way "accession" did not necessarily imply the correlative right of secession.

[5] *Ibid.*

[6] The first portion of it, lasting for three hours, is compressed into two pages of Madison's Minutes.

important is this that I venture to rearrange the material just given and summarize the conclusions. While Hamilton and Wilson, as we have seen, held that the people of America were already united in a sort of social compact—or, at least, that the Declaration of Independence did not throw the states into a state of nature in their relations; and while Madison contented himself with asserting that the Articles were similar to a convention among independent states, Martin disclosed the full meaning of what was contemplated from the view-point of the social-compact theory. Concluding that the states were now equal as individuals in a state of nature, and that to give unequal voting power in Congress would be destructive of that equality, and hence of the existing liberty, he also pointed out that to recur not to the state governments but to the people for the adoption of the Constitution and the establishment of the national government would mean that all people would be thrown into a state of nature; each person was now in society and had a government to which he was bound by constitutional compact, and, if he established a new government over himself, he took away from the state government and redistributed political authority. This he had no right to do without the consent of the state government.

One more quotation in this connection will be sufficient indication that the idea of the social compact was influencing the minds of the framers of the Constitution in the formation of the new government and the foundation of the new republic. When the Constitution was finally drawn up and presented to the Congress of the Confederation, Washington in his letter to that body declared that the framers had continually in mind the consolidation of the Union; but he evidently thought that consolidation could arise out of agreement. "It is obviously impracticable," he wrote, "in the federal government of these states, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to secure the rest." [1]

In looking over the debates in the state conventions and the pamphlets and essays written on the question of adoption, we find further evidence of the presence of the social compact theory and of the compact philosophy. Wilson said in the Pennsylvania convention: "When a single government is instituted, the individuals of which it is composed, surrender to it a part of their natural independence, which they enjoyed before as men. When a confederate republic is instituted, the communities in which it is composed sur-

[1] Elliot's *Debates*, I. 305.

render to it a part of their political independence which they formerly enjoyed as states."[1] Exactly the same sort of statement was made and the same illustration used by a number of other men. Dickinson, for example, said, "As in forming a political society, each individual contributes some of his rights, in order that he may, from a *common stock* of rights, derive greater benefits than he could from merely *his own;* so, in forming a confederation, each political society should contribute such a share of their rights, as will, from a *common stock* of these rights, produce the largest quantity of benefits for them."[2] Mr. Hartley in the Pennsylvania convention said: "That the rights now possessed by the States will in some degree be abridged by the adoption of the proposed system, has never been denied; but it is only in that degree which is necessary and proper to promote the great purposes of the Union. A portion of our natural rights are given up in order to constitute society; and as it is here, a portion of the rights belonging to the states individually is resigned in order to constitute an efficient confederation."[3] Mr. Barnwell of South Carolina "adverted to the parts of the Constitution which more immediately affected" his state. He declared that "in the compacts which unite men into society, it always is necessary to give up a part of our natural rights to secure the remainder. . . . Let us, then, apply this to the United States."[4] David Ramsay in an *Address to the Freemen of South Carolina* uses the same expressions:

"In a state of nature, each man is free, and may do what he pleases; but in society every individual must sacrifice a part of his natural rights. . . . When thirteen persons constitute a family, each should forego everything that is injurious to the other twelve. When several families constitute a parish, or county, each may adopt what regulations it pleases with regard to its domestic affairs, but must be abridged of that liberty in other cases, where the good of the whole is concerned . . . When

[1] Elliot, II. 429. McMaster and Stone, *Pennsylvania and the Federal Constitution*, 227. Wilson's *Works*, I. 539 (Andrews's ed.).

[2] Letters by John Dickinson, in *The Federalist and other Constitutional Papers*, edited by Scott, p. 789. See also same argument in letter signed "Farmer" in McMaster and Stone, p. 533. In spite of the fact that in this latter essay sovereignty is said to consist in the "understanding and will of political society," sovereignty is evidently considered divisible and to be divided in the new order proposed by the Constitution. *Ibid.*, 534, 539. See also, for the same argument, Letters of Fabius (John Dickinson) in Ford's *Pamphlets on the Constitution*, 176.

[3] McMaster and Stone, p. 292. The reference in this speech to the union of England and Scotland is significant. Mr. Findlay in objection to the Constitution said: "In the preamble it is said, *We the People* and not *We the States*, which therefore is a compact between individuals entering into society, and not between separate states enjoying independent power, and delegating a portion of that power for their common benefit.' *Ibid.*, p. 301.

[4] Elliot, IV. 295.

several states combine in one government, the same principles must be observed."[1]

The Massachusetts convention furnishes us with some interesting material. Ames seems to have spoken in very modern language and to have discarded in some measure the idea of compact; he rejected at least some portions of the ordinary conclusions springing from the compact theory. "I know, sir, that the people talk about the liberty of nature, and assert that we divest ourselves of a portion of it when we enter society. This is a declamation against matter of fact. We cannot live without society. . . . The liberty of one depends not so much on the removal of all restraint from him as on the due restraint upon the liberty of others. Without such restraint there can be no liberty."[2] Rufus King, however, expressed his opinion that the American people were the first to obtain a full and fair representation in making the laws through the social compact.[3] Bowdoin referred to the same clause in Montesquieu to which Wilson made reference in his well known speech in the Pennsylvania convention, and, relying upon the analogy of the social compact, said "to balance the powers of all the states, by each giving up a portion of its sovereignty, and thereby better to secure the remainder of it, are among the main objects of a confederacy" [a Confederate Republic].[4] It is certainly significant that, when the Massachusetts convention finally adopted the Constitution, it gave consent in the following words: "Acknowledging, with grateful hearts, the goodness of the Supreme Ruler of the universe in affording the people of the United States in the course of His providence an opportunity, deliberately and peaceably, without fraud or surprise, of entering into an explicit and solemn compact with each other, by assenting to and ratifying a new constitution."[5] New Hampshire seems to have used the same words in the resolution of ratification.[6]

In Hamilton's writings are found many references to the social compact. It is quite evident that he had in mind as a working hypothesis the artificial construction of society and the body politic;

[1] Ford's *Pamphlets on the Constitution*, p. 373. Notice also the exceedingly able characterization of the Constitution by Noah Webster. *Ibid.*, pp. 29, 45, 55.

[2] Elliot, II. 9. This idea of liberty is not new or essentially modern, however. Cicero said "Lex fundamentum est libertatis qua fruimur. Legum omnes servi sumus, ut liberi esse possimus." Said Thomas Hooker: "It is the honor and conquest of a man truly wise to be conquered by the truth; and he hath attained the greatest liberty that suffers himself to be led captive thereby." *The Way of the Churches of New England.*

[3] Elliot, II. 19.

[4] Elliot, II. 129.

[5] Elliot, II. 176. It is worth remembering in this connection that Massachusetts called her own constitution a compact.

[6] Walker, *History of the New Hampshire Convention*, p. 46.

and in speaking of the new federal Constitution he, like the others, compared it to an original compact formed by individuals.[1] In the Federalist he made use of the following language:

"But it is said, that the laws of the Union are to be the *supreme law* of the land. What inference can be drawn from this, or what would they amount to, if they were not to be supreme? It is evident they would amount to nothing. A *law*, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government; which is only another word for *political power and supremacy*."[2]

There are certain remarks of Wilson in the Pennsylvania convention which seem at first sight to deny the compact origin of the Constitution altogether. But it seems to me that he intended to assert that the Philadelphia convention was not contracting or forming a contract; that the new order was to spring from the people, not from delegates from the states at Philadelphia; and especially that in America there is no inviolable contract between government and society. He came very near to the conception of the people of the United States as one body politic, as a single creating unit establishing the Constitution. Indeed, that may possibly be the idea he had in mind. But it seems more likely that he was thinking of the people of each state as the real establishing authority and of the relationship that was to exist between the government of the United States and the people.

"I have already shown that this system is not a compact or contract; the system itself tells you what it is; it is an ordinance and establishment of the people."[3] "If we go a little further on this subject, I think we see that the doctrine of original compact cannot be supported consistently with the best principles of government. If we admit it, we exclude the idea of amendment because a contract once entered into between the governor and governed becomes obligatory and cannot be altered but by the mutual consent of both parties."[4]

[1] *Works*, II. 322. See also *ibid.*, 320, 376; VII. 294, 334, 336. As may be seen later in my presentation of this subject, the important fact is not so much that men thought the Constitution a social compact as that they thought of society and the state in general as artificial and based on intellectual consent.

[2] *Federalist*, No. XXXIII. The italics are in the original. See also No. XXII.

[3] McMaster and Stone, 385. This speech is quoted by Bancroft to prove, apparently, that the Constitution was not considered a mere treaty between independent states.

[4] *Ibid.*, 384-5.

It should be observed that the notion of a binding contract or compact between government and governed, which is here rejected by Wilson, was in very evident conflict with American conditions. It could not well be supposed that any government was possessed of sovereignty or that a constitution formed an inviolable and unalterable contract between a sovereign government and its subjects. And yet there was some difficulty in breaking away even from that portion of the old contract notion. Rousseau of course altogether rejected the notion of a contract between the sovereign people and the government, and the French idea was in this respect much more in harmony with later American conditions than was the idea of Locke, in spite of the fact that the American Revolution was fought out on the principle of the English philosopher and in recognition of the idea of a contract between king and people. But in spite of its seeming inapplicability to American institutions, the notion was too firmly rooted not to retain its hold long after the adoption of the Constitution. It appears in arguments and discussions as to the nature of the United States and the character and authority of the central government. Jefferson declared in the Kentucky Resolutions that the Constitution was a compact between states and that each state was an "integral party, its co-states forming, as to itself, the other party." But before the paragraph is finished he seems to argue that a contract exists also between the states and the government. As is well known, Hayne in his speech on the Foote resolutions spoke as if the states were one party to a compact and the United States government the other.[1]

These quotations and references may be sufficient to indicate that men were thinking of the possibility of establishing a new political organization and a new government by agreement and consent. It is clear that something different from a mere convention between sovereign and independent states was contemplated. Thinking as they did in the terms and under the limitations of the compact theory and the compact philosophy, they did not speak of the new state as "original" or "organic" or "natural," or declare that a binding law must rest upon the force or will of an organism

[1] "A State is brought into collision with the United States, in relation to the exercise of unconstitutional powers; who is to decide between them? Sir, it is the common case of difference of opinion between sovereigns as to the true construction of a compact." —Hayne's Reply to Webster, January 27, 1830.

"The common notion," says Madison, "previous to our Revolution had been that the governmental compact was between the governors and the governed, the former stipulating protection, the latter allegiance. So familiar was this view of the subject that it slipped into the speech of Mr. Hayne on Foote's Resolution and produced the prostrating reply from Mr. Webster." Madison's *Writings*, IV. 296. See the correspondence of Governor Troup of Georgia with President John Quincy Adams.

existing before the law was issued. On the contrary, all states were artificial not natural, superimposed not original; society itself was not natural or original but formed artificially, in time, by the conscious intellectual consent of its framers. Inasmuch as government, political organization and unity can rest on consent, can be based on the action of thirteen bodies acting in isolation, all that was necessary was to obtain the separate consent of the people of the thirteen states.[1]

Those who likened the Constitution to a social compact seem to have had two ideas somewhat different in character. Some of them had in mind the combination of each person with every other in the establishment of a new society and body politic; others thought of thirteen bodies of individuals each yielding up a portion of its self-control and thus forming a new unity as men do when organizing a simple state or society. Most of the quotations previously given disclose the latter idea. That bodies or groups of men were thus by agreement forming the United States was the thought of Wilson and Hamilton and Dickinson. But Luther Martin, who reasoned on the basis of the compact theory with inexorable logic, insisted that the individual men were compacting together.

"It is, in its very introduction, declared to be a compact between the people of the United States as individuals; and it is to be ratified by the people at large, in their capacity as individuals; all which, it was said, would be quite right and proper, if there were no state governments, if all the people of this continent were in a state of nature, and we were forming one national government for them as individuals; and is nearly the same as was done in most of the states, when they formed their governments over the people who composed them."[2]

It is an interesting fact that these two differing views of the way

[1] No one will seriously maintain that Marshall believed that the United States was only a confederation of sovereign states. But did he believe that it was necessary that the American people should exist as a body politic before the Constitution was adopted in order that the Constitution might be a real constitution and the United States an actual unity? "They [the people] acted upon it, in the only manner in which they can act safely, effectively, and wisely on such a subject, by assembling in convention. It is true, they assembled in their several states—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate states, and of compounding the people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of state governments."—McCulloch *vs.* Maryland, 4 Wheaton, 316. It is quite possible that Marshall believed that although the people were geographically separated they were acting as a single body politic which was laying down its will in a supreme law. But it is also possible that he thought of a supreme law resulting from the action of thirteen bodies of people, a law which when adopted was to be the supreme law of the land.

[2] Luther Martin's Letter. Elliot, I. 360. The convention of Massachusetts had the same idea, if we judge by the words of ratification.

in which the Constitution was established have survived, although writers do not use the words "compact" or "state of nature," or "sovereignty of the individual man," or like expressions. Sometimes we hear it said that the states entered into the Union each giving up a portion of its sovereignty. This is the idea of Wilson, the idea that bodies or groups of men by compact created "a new one."[1] Sometimes it is said that the people established the Constitution; but the thought seems to be, not that the people as a single body politic was acting, but that each individual contracted with others in establishing a new political organization and recognizing a new government.[2] This is the idea of Luther Martin.

The first important constitutional case before the Supreme Court turned in large measure on the nature of the Union. The opinions of Wilson and Jay are significant, and it may indeed be said that Jay's opinion furnished the basis on which the judicial interpretation of the Constitution has in large measure rested. Wilson declared that there was only one place where the word sovereign might have been used with propriety; the people "might have announced themselves '*sovereign*' people of the *United States.*" And yet he goes on to say: "The only reason, I believe, why a freeman is bound by human laws, is, that he binds himself . . . If one freeman, an original sovereign, may do this, why may not an aggregate of freemen, a collection of original sovereigns, do this likewise?"[3] Jay asserted, with a clearness uncommon even in later decisions, that the people in their collective and national capacity established the Constitution. But he also said in this immediate connection: "Every state constitution is a compact made by and between the citizens of a state to govern themselves in a certain manner; and the Constitution of the United States is likewise a compact made by the people of the United States to govern them-

[1] "When a single government is instituted, the individuals of which it is composed surrender to it a part of their natural independence, which they enjoyed before as men. When a confederate republic is instituted, the communities of which it is composed surrender to it a part of their political independence, which they formerly enjoyed as states." Elliot, II. 429; McMaster and Stone, 227. It does not seem however that Wilson was always consistent in his advocacy of this idea. See his opinion in the case of Chisholm *v.* Georgia, quoted later.

[2] "It is a compact among the *people* for the purpose of government, and not a compact between states. It begins in the name of the people and not of the states." Letters of Agrippa, Ford's *Essays*, 112.

The survival of the compact method of thought is interestingly shown in Bryce. "The acceptance of the Constitution of 1789 made the American people a nation." "The power vested in each state . . . belonged to the State before it entered the Union." "The loosely confederated States of North America united themselves into a nation." *American Commonwealth*, abridged ed., pp. 16, 229, 167.

[3] Chisholm *vs.* Georgia, 2 Dallas 415, 456.

selves as to general subjects in a certain manner. By this great compact, however, many prerogatives were transferred to the national government . . ." [1] He then reached the conclusion that the "sovereignty of the nation is in the people of the nation and the residuary sovereignty of each state in the people of each state."

In the light of the material which I have cited, one might perhaps be fully justified in affirming that the framers of the Constitution considered it a compact analogous to a social compact, and similar in its origin to the state constitutions in all essential particulars. I think that such is the reasonable conclusion. But whether that be the proper generalization or not, it seems perfectly safe to assert that the student who is interpreting the words and acts of men of the last century must remember the contract theory and the philosophy of Locke. It is well also to remember that men who were thinking in terms of the compact philosophy could believe in the establishment of a permanent and indissoluble body politic as the result of agreement between hitherto separate bodies; that they could believe in the permanent binding effect of a law which had its origin in consent. To them the correlative of "accession" was not secession, but a continuing relationship.

The Virginia and Kentucky Resolutions, if approached from the view-point of the compact philosophy, may bear an interpretation quite different from that commonly given them, and different from that assigned to them by Hayne and Calhoun, who had begun to speak in the terms of organic philosophy. In other words, the Virginia Resolutions, at least, can bear just the interpretation which Madison insisted, thirty years after their appearance, was the correct one, because in 1830 he was still speaking as a disciple of Locke and as a statesman of the eighteenth century. If sovereignty is indivisible,—as it must necessarily be in the organic conception of the state,—then if Kentucky is sovereign, it is wholly self-determinant. But if sovereignty is divisible, the assertion that Kentucky is sovereign is not incompatible with the idea that the United States is also possessed of sovereignty. If a body politic, a state, cannot originate in agreement, then to call the Constitution a compact,

[1] *Ibid.*, 471. For a similar idea as to division of sovereignty resulting from compact, see Pinkney's oft-quoted speech on the Missouri restriction: "The parties gave up a portion of that sovereignty to insure the remainder. As far as they gave it up by the common compact, they have ceased to be sovereign." Benton's *Abridgment*, VI. 439. Monroe said, "In the institution of the Government of the United States by the citizens of every State a compact was formed between the whole American people which has the same force and partakes of all the qualities to the extent of its powers as a compact between the citizens of a State in the formation of their own constitution." Message, May 4, 1822; Richardson, *Messages and Papers*, II. 147, 148.

and to say that "each state acceded as a state and is an integral party"[1] is equivalent to saying that the Constitution is a mere treaty and the United States merely a league. But if a body politic, a new indissoluble whole, can be established by agreement, between hitherto separate units, if government rests on consent, if a solemn compact is the surest foundation of a state, then to say that the Constitution is a "compact to which the States are parties," is not a declaration that the United States is not a unit or a state. If law is the expression of the will of a pre-existing superior body, and if the Constitution is an agreement between equals, then it can in no true sense be law. But if the only way in which a man can be bound is by binding himself, if law springs from consent and agreement among equals, if government itself rests on consent, then the Constitution may have been a compact and nevertheless be law.

Granted that the Constitution is a social compact formed by agreement among bodies of individuals hitherto in a state of nature, and suppose the government of the new organization assumes powers not granted in the compact, what then is to be done? The Virginia Resolutions do not explicitly say that more than a protest is desirable. Jefferson had in mind, it seems, the social compact idea in his suggestion of a remedy: "Every state," he said, "has a *natural right* in cases not within the compact . . . . to nullify," etc. These words were stricken out and did not appear in the final draft of the resolutions as they were passed by Kentucky. Again he said: "That the co-states recurring to their *natural rights* in cases not made federal,"[2] etc. It may be said, then, that the Virginia and Kentucky Resolutions did not proclaim state sovereignty, or that each state was the sole ultimate judge of a law and had the right to secede whenever a law was passed that was contrary to its desire; but that, inasmuch as the states entered as parties into the social compact, they (not each one) were ultimate judges of whether the rights reserved by the states, the natural rights, had been encroached upon. "Who shall be the judge," says Locke, "whether the prince or legislative act contrary to their trust? . . . To this I reply, The people shall be judge . . . If a controversy arise betwixt a prince and some of the people in a matter where the law is silent or doubtful, and the thing be of great consequence, I should think the proper umpire in such a case should be the body of the people."[3] But this is something entirely different from saying that each man shall be judge. "For, when any number of men have, by the consent of every individual, made a com-

[1] First Series, Kentucky Resolutions.

[2] Italics my own. See Jefferson's *Writings*, ed. Ford, VI. 301, 308.

[3] Book II., Sections 240, 242.

munity, they have thereby made that community one body. . . . And thus every man . . . puts himself under an obligation to every one of that society to submit to the determination of the majority and be determined by it."[1] Calhoun himself, yielding to the inevitable idea that there must be something less than palpable interstate anarchy based on state willfulness, provided in his scheme for a convention of the states; but after the majority of three-fourths had decided against the protesting state, it still retained the right to nullify or secede. It was not obliged to submit to the majority.

If one starts with Madison's philosophical ideas the interpretation which he put on the Virginia Resolutions, when he wrote of them in the period from 1830 to 1835, is the reasonable, logical and inevitable interpretation. Is it proper to approach the resolutions with any other ideas than those held by the writer? It is worth while to quote a few of his words written at the latter date.

"It has hitherto been understood that the supreme power, that is, the sovereignty of the people of the States, was in its nature divisible, and was, in fact, divided . . .; that as the States in their highest sovereign character were competent to surrender the whole sovereignty and form themselves into a consolidated State, so they might surrender a part and retain, as they have done, the other part. . . . Of late, another doctrine has occurred, which supposes that sovereignty is in its nature indivisible; that the societies denominated States, in forming the constitutional compact of the United States, acted as indivisible sovereignties, and, consequently, that the sovereignty of each remains as absolute and entire as it was then. . . . In settling the question between these rival claims of power, it is proper to keep in mind that all power in just and free governments is derived from compact."[2]

These words of Madison go, in my opinion, to the root of the matter. Calhoun's proposition rested on the doctrine of the indivisibility of sovereignty, and this was a notion resulting from the fact that he was beginning to think and speak in terms of the organic philosophy.[3] He did not, as far as I can find, in so many words discard the social contract in general until he wrote his *Disquisition on Government*, some sixteen years after the nullification trouble. But as a matter of fact the strength of the argument for complete state

[1] Sec. 96, 97. This proposition for interpretation of this portion of the Kentucky Resolutions is in a measure tentative not final. Madison thought that Jefferson meant by nullification "the natural right, which all admit to be a remedy against insupportable oppression"—in other words the right of revolution. Madison's *Writings*, IV. 410.

[2] Madison's *Writings*, IV. 390, 391. See also *ibid.*, pp. 61, 63, 75, 294, 395, 419. How fully the nullification theory rests on the indivisibility of sovereignty is seen by an examination of the Address to the people of South Carolina by their delegates in convention.

[3] Madison, IV. 394, gives a beautiful example of how absolutely impossible it was for the clearest thinkers to adhere at first to the doctrine of indivisible sovereignty of a "moral person." Rowan's speech is in Niles's *Register*, XXXVIII., Supp., p. 46.

sovereignty and the right of secession rests on the philosophic conception of the indivisibility of sovereignty; and coupled with this philosophical conception is the idea that states do not originate in agreement and that law is the expression of the will of a superior being. I do not mean to contend that Calhoun consistently spoke in terms of the organic philosophy. On the contrary, he occasionally fell back into the thought and expression of the preceding generation; that was inevitable. But his argument as it was developed, really rested on philosophic presuppositions foreign to the thinking of the time when the Constitution was adopted.[1] If the student of Calhoun's writings does not agree with me in this, perhaps he will be willing to admit that the argument in behalf of state sovereignty, as it has been developed and worked out, for example by Alexander H. Stephens, relies on presuppositions belonging to the organic philosophy. When once the defender of the position has demonstrated that the states were sovereign before the Constitution was adopted and that they adopted the Constitution as separate states, he is ready to believe his point proved; because he believes that unity cannot spring from agreement, that an agreement between isolated beings ends in agreement and nothing but agreement.

Madison's letters of the nullification period are a complete answer to Hayne and Calhoun, written from the standpoint of the men who made the Constitution. But the same sort of reply came from other sources. Jackson's proclamation, for example, is written on the old lines of the compact idea:

"The Constitution of the United States, then, forms a *government*, not a league; and whether it be formed by compact between the States, or in any other manner, its character is the same. . . . Because the Union was formed by compact, it is said the parties to that compact may, when they feel themselves aggrieved, depart from it; but it is precisely because it is a compact that they cannot. A compact is an agreement or binding obligation. It may by its terms have a sanction or penalty for its breach or it may not."

Of great interest in this connection are the resolutions which some of the states drafted in answer to South Carolina.[2] They are exceedingly good examples of the continuance of the social-compact idea and of the compact philosophy. Massachusetts spoke as

[1] The reader may notice especially that in his letter to Governor Hamilton of August, 1832, Calhoun expended great effort to show that there had been no such body politic as the American people before the adoption of the Constitution. The adoption, therefore, he would seem to say, by thirteen bodies politic does not make law but agreement.

[2] It is sometimes overlooked that nearly every state which answered the resolutions of South Carolina declared her theory a heresy and of dangerous tendency. See even the resolutions of North Carolina and Mississippi.

she might have spoken forty years earlier: "The constitution of the United States of America is a solemn Social Compact, by which the people of the said States, in order to form a more perfect union . . . formed themselves into one body politic."[1] Ohio's answer was much the same: "Resolved that the Federal Union exists in a solemn compact, entered into by the voluntary consent of the people of the United States, and of each and every State, and that therefore no State can claim the right to recede therefrom or violate the compact. . . ."[2] The argument in the report of the Senate Committee of Massachusetts is especially significant, because it so clearly and keenly analyzes the position of South Carolina and meets the proposition of the nullifiers so squarely. The committee saw that nullification rested on this assumption: "The States were independent of each other at the time when they formed the Constitution; therefore they are independent of each other now." To one thinking rigidly in the terms of the organic philosophy the assumption that the states were independent and separate when they formed constitutions is equivalent to a declaration that they were independent afterwards or at least that the mere adoption of the Constitution did not deprive them of independence. But the Massachusetts committee answered in terms of the compact philosophy, and thus stood in the position of the men of 1787, who could see no reason why an actual unity should not result from consent. "The rights and obligations," said this committee, "of the parties to a contract are determined by its nature and terms, and not by their condition previously to its conclusion."[3]

Generalizations with regard to this subject are dangerous and difficult; but it certainly seems inevitable that one must draw at least this conclusion—Men differed, in part at least, because of their different fundamental conceptions, and those conceptions were philosophic. One side declared that the Constitution was a compact and therefore not binding; the other side declared that the Constitution was a compact and therefore was binding. One side said that sovereignty was indivisible; the other declared that it was divisible and had been divided. The organic philosophy is accepted by

[1] *State Papers on Nullification*, Boston, 1834, p. 128. The quotations above given are of course only a small part of these replies.

[2] *Ibid.*, p. 206. See also p. 214.

[3] *Ibid.*, 119. "Now there can be no doubt, that independent states are morally as capable of forming themselves into a body politic, as independent individuals. . . . Hence, were it even admitted, that the states were distinct and independent communities at the time when they framed the Constitution, the fact would no more prove that they are distinct and independent communities now, than the fact that two parties to a marriage contract were single before its conclusion goes to prove that they are single afterwards," *ibid.*

modern philosophic publicists and writers of political science. Will they say that, because the men of 1787 did not act and speak in the terms of the philosophy which arose from the civilization of the next century, a philosophy which was first decisively manifested in Hegel and given full expression by the more modern political philosophers, they did not do what they intended to do? Would it not be as wise to insist that, inasmuch as Locke's philosophy is now rejected, James II. was not overthrown, and that his descendants are entitled to exercise the prerogatives of the British crown? The judicial construction of the Constitution has remained in large measure in accord with the compact philosophy. Shall we declare that judges and lawyers must abandon the traditional idea of the division of sovereignty or the theory that the states come into the Union surrendering a portion of their sovereignty, and that the acceptance of the Constitution made the American people a nation? Is there not much to be said in favor of adherence to old and original notions?

But the organic philosophy of course obtained its followers among those who gave the national construction to the Constitution, and before the Civil War men were meeting the advocates of secession on their own ground.[1] The organic character of the United States can be sustained on an interpretation of acts, facts and forces of the Revolutionary period, 1760–1790, which takes into account the realities which underlay all seeming conditions or the conscious acts of men. I do not mean to affirm or deny that men were clearly conscious of national life and of the idea that the states were not truly sovereign.[2] I mean simply to say that by the very character of the organic philosophy one is compelled to go beneath the surface and to see realities. Of course men who argued from the basis of the organic idea and nevertheless maintained that the United States was more than a multiple of units organically separate, did not in so many words declare that they had taken up new philosophic ground; but in fact they had left compact thinking behind them, and from the new view-point met the declaration of state sovereignty with a new interpretation of history which naturally and logically

[1] I have omitted reference to Webster, because Webster's speeches on the subject require longer and fuller exposition than I can give them in this article. Story, too, deserves special examination; but, as was to be expected in his time, there is great confusion in his writings and a single idea is not carried through logically. He sometimes talks in terms of compact; sometimes not.

[2] I have already shown that some men believed that the states were not made independent of each other by declaring independence from Great Britain. See the speech of Pinckney before the South Carolina convention, as well as many assertions in the Philadelphia convention, or Hamilton's well known statement that a nation without a national government was an awful spectacle. They were more or less conscious of the reality—the existence of national life.

sprang from the new methods of thought. The ordinary mode adopted was to deny that the states were ever sovereign and to insist, as Lincoln did, that the Union was older than the states.

An excellent example of this method of interpreting history is found in Alexander Johnston's article on state sovereignty in Lalor's *Cyclopædia*. Granted that sovereignty is not simply law-making power, but the will, the impulse, the controlling motive of a mass of people organically fused together, where are we to find such a will, where are we to find such actual fusion, this dominating reality, before 1789? Evidently not in the incompetent states, for to call them sovereign is to give a meaning to sovereignty incompatible with the organic philosophy.

"The states declared themselves sovereign over and over again; but calling themselves sovereign did not make them so. It is necessary that a state should be sovereign, not that it should call itself so, while still sheltering itself under a real national authority. The nation was made by events and by the acts of the national people, not by empty words or by the will of sovereign states. . . . The national feeling held the nation together, and forced the unwilling state governments to stand sponsor to a new national assembly. Such was the convention of 1787."[1]

Now my contention is that this philosophic interpretation of facts, seizing the underlying verity, is not only admissible but necessary for those who insist on reading the events of those days from the view-point of the organic philosophy. But I also contend that if the *conscious* deeds and words of men are to form the sole basis of our argument, then we are thinking as becomes those who are bound by the conceptions of the compact philosophy, the distinguishing characteristic of which was that it never went below the consciousness in whatever field of human thinking it showed itself, in the two centuries during which it reigned supreme; and we are also bound to remember that the framers were thinking and speaking in terms of compact and believed that agreement could establish unity.

That methods of constitutional interpretation as well as arguments on the essential character of the United States should be influenced by the development of political philosophy was inevitable. For philosophy is only one field of thought, unless it be, as the philosophers claim, the sum of all. The political philosophy of this century is merely the systematization of ideas and modes of thought produced by the developments of the century. And it is exceedingly significant that the organic idea should have first been used in behalf of a declaration that the United States was not organic and that it should have found expression in the acts of a state where society

[1] Lalor's *Cyclopædia*, III. 791.

was and had been from the beginning peculiarly unitary in its make-up, in the acts of a state which had from early days felt its individuality. It is a striking paradox that the organic philosophy should have formed the basis for the defense of slavery which was disorganizing the nation. Paradoxical, too, is the fact that abolitionism received its being from the growing realization that all men were one, from the prevalence of the humanitarian spirit which has found verbal formulation in the precepts of the organic philosopher.

When organic thinking has shown itself in all fields of thought —in science where men have ceased to speak of the isolated creation of matured species, or even of the isolated development of a single animal, but speak rather of the organic character not simply of an isolated specimen but of the natural world; in history, where the investigator looks behind the conscious acts of men to the hidden forces which were working in society, and smiles at the idea that Caesar overthrew the Republic or that Lincoln destroyed slavery; in sociology, where students give themselves up to the study of social change and social regeneration; in metaphysics, where the scholar seeks to show the unity, which exists in all seeming diversity, and can explain nothing except in its relations and as part of a whole—when all the forces of modern life have drawn men together and made society more truly and really one than ever before, save, perhaps in the little states of ancient Greece, it is perfectly inevitable that an organic notion of political society should prevail. It was inevitable, too, that political thinking and argument in the course of this century should have been materially affected by the modification and development of society. The constitutional history of the United States is in no small degree taken up with tracing opinion and assertion as to the actual character of the Union; and the historian is compelled to notice the change which took place in the opinions, words and thoughts of statesmen as they were influenced by the change in society and by the prevalence or growth of doctrines as to the origin and nature of the state. The Civil War was doubtless caused by economic conditions, and by economic and moral differences; but each of the contending parties was struggling for what it believed to be the law. Opinion as to what was the law depended on the interpretation of history and also upon the acceptance or rejection of certain philosophic conceptions.

My purpose in this paper has been to show: (1) That the men of one hundred and twenty-five years ago thought within the limits of the compact philosophy; (2) That they carried the compact idea so far that they actually spoke of the Constitution as a social compact; (3) That it is necessary for us to remember their fundamental

ideas and to interpret their words and conscious acts in the light of their methods of thought; (4) That in the development of modern organic philosophy new ideas were introduced and new meanings assigned to terms; (5) That from this latter fact, from the inability to agree on fundamental conceptions, arose confusion; (6) That the doctrine of state sovereignty as it has been developed rests on philosophic presuppositions almost if not entirely unknown to the framers of the Constitution; (7) That if we use the terms and insist on the ideas of the organic philosophy, we are entitled to seek the realities lying behind the words of men.

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